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No. 91-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,
Petitioners,

v.

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Was the Court of Appeals correct in holding that former employees may establish standing to sue for being involuntarily discharged in violation of § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA") by proving, not merely alleging, that but for the violation of § 510, they would be current employees with a reasonable expectation of receiving benefits?

LIST OF PARTIES

Petitioners: (Defendants-Appellees below):

Mobil Oil Corporation, a subsidiary of Mobil Corporation (a publicly held corporation). A list of Mobil Oil Corporation's non-wholly-owned subsidiaries has been included in the Appendix to their petition [46a].

Retirement Plan of Mobil Oil Corporation

Rex D. Adams (a Vice President of Mobil Corporation)

Respondents: (Plaintiffs-Appellants below):

Gerald W. Christopher

Charles L. Prunty

Billy G. Turner

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

At issue here is whether the Court of Appeals correctly held that standing to sue under ERISA § 510 may be established by former employees, notwithstanding their receipt of a lump sum payment of all their accrued pension benefits, if they prove: (1) that their employer's misrepresentations and concealment of certain material facts prior to the empolyees' "retirement" decision caused the retirements and rendered them involuntary in the same sense that an outright firing is an involuntary dis-

charge; and (2) that but for the violation of § 510, the respondents would in fact be current employees "eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7).

I. COUNTERSTATEMENT OF THE FACTS.

Plaintiffs were each employed by Petitioner Mobil Oil Corporation ("Mobil") for more than 35 years. As part of their compensation, they earned retirement benefits, including a pension under a defined-benefit Retirement Plan (the "Plan"). For many years, such pensions were paid in the form of monthly annuities. But in 1977, Mobil amended the Plan to allow retiring employees to take their pensions in a lump sum, reduced to present value using a 5% discount rate. To qualify for this lump sum option, the retiring employee had to have $250,000 in accrued pension or had to show a personal net worth, exclusive of his Mobil pension, exceeding that figure.

A. The July 1984 Plan Amendment.

In late 1983 and early 1984, Mobil's Executive Committee began consideration of changes to the lump sum benefit. The 5% discount factor had made the lump sum far more valuable—approximately 40% more valuable—than the annuity benefit. The intervening years of inflation, including salary inflation, had made a majority of Mobil's employees eligible for the lump sum under the $250,000 test. Utilization of the lump sum option was becoming virtually universal. The Executive Committee wanted to increase the discount factor and the eligibility test or "threshold."

By May 1984, however, Mobil knew that Congress was likely to pass an amendment to ERISA that would prevent "cutbacks" in defined benefits, including "optional" forms of benefits such as Mobil's lump sum option. The proposed amendment, eventually enacted as part of the

Retirement Equity Act ("REA"), would not prohibit such "cutbacks," however, if made before July 30, 1984. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 302 (d)(1), 98 Stat. 1426, 1451-52 (codified, as amended, 29 U.S.C. § 1001, Historical and Statutory Notes).

Mobil's Executive Committee acted quickly. On June 13, 1984, it adopted and on July 2, 1984, it announced a Plan amendment: (a) increasing the discount factor from 5% to 9.5% for benefits accrued after February 1, 1985; and (b) increasing the lump-sum eligibility threshold from $250,000 to $450,000, also effective February 1, 1985, to be increased thereafter by the consumer price index. The change in the threshold eligibility requirement was not made prospectively. That is, once the Plan amendment became effective, the new eligibility test would apply to all retirees and with respect to the entirety of their pension.

B. The Sixth-Month "Window" Retirement Program.

Ostensibly as a matter of fairness, Mobil also announced on July 2, 1984, a special, six-month "window" retirement program for those employees who were 55 or older before the new Plan amendment became effective. They could take their pension in a lump sum under the old $250,000 test—but only if they retired by January 1, 1985. As part of this window "program," Mobil waived certain advance notice requirements for electing the lump sum.

For more than 1,000 Mobil employees, the Plan amendment and the six-month window operated as an "early retirement" program—and an inexpensive one for Mobil, since it was not required to pay any "incentives" to encourage the early retirements. Indeed, Mobil's net savings for this "early retirement" program were nearly $300 million.

At the time it announced the Plan amendment and the "window" retirement program, Mobil informed its em-

ployees that the amendment was "subject to IRS approval" —i.e. an IRS determination that the Plan, as amended, would continue to meet the IRS' criteria for "favorable tax treatment." The plaintiffs and their fellow "window retirees" were led to believe that such IRS approval would be routine. After all, Mobil had the right to adopt the Plan amendment when it did. In fact, Mobil could have abolished the lump sum benefit altogether—so long as it did so before July 30, 1984, the effective date of the REA's "anti-cutback" provision.

To this point in events, Mobil's conduct did not violate ERISA. In particular, as to § 510 of ERISA, if retirement-eligible employees chose to "opt" for the lump sum benefit and to give up their jobs to get the lump sum, their retirements would not constitute unlawful discharges in violation of § 510. Instead, they would be making a conscious, albeit unwanted, decision to retire and to receive all their retirement benefits earned through the date of retirement.

C. The September 1984 Plan Amendment.

On July 16, 1984, Mobil submitted its application for a determination letter to the IRS. The chief concern was whether the new $450,000 threshold would "discriminate in favor of highly compensated employees," in violation of 26 U.S.C. § 401(a)(4). In September, the IRS agent reviewing the Plan amendment informed Mobil that he would not approve it, because it would indeed favor Mobil's "highly paid executives."

Although Mobil informed its Executive Committee of the IRS' rejection of the Plan amendment, it did not inform its rank and file. Instead, in late September 1984, it made a new amendment, incorporating into the amendment proposed in July, a right of each employee to apply for a waiver of the $450,000 threshold. This new Plan amendment reserved to Mobil "sole discretion" to grant such waivers "in individual cases for valid cause shown."

However, Mobil has admitted that the purpose and intended operation of the waiver clause was to prevent "statistical" discrimination in favor of highly compensated employees. Since eligibility for the lump sum option among Mobil's highly paid employees would be virtually universal even under the $450,000 test—a fact Mobil knew from internal and outside actuarial studies—the practical effect of the waiver clause was inescapable: it would negate the $450,000 threshold amendment.

D. Mobil's Misrepresentations and Concealments.

The IRS informally approved the new amendment in October. However, Mobil again made no announcement to its rank and file. It did not inform the employees that the IRS had rejected the originally proposed Plan amendment, that a new amendment had been adopted—after the July 30, 1984 effective date of the REA—or that employees now had a right to apply for a waiver of the $450,000 requirement.

To the contrary, Mobil actively concealed these facts from employees considering retirement under the "window" program. For example, in October 1984, Mobil prepared two memoranda concerning the IRS' approval of the new Plan amendment. One was sent to Mobil's Executive Committee and correctly described the amendment as adopted the previous month, including the new waiver clause. The second memorandum, addressed to Mobil's employee relations managers throughout the country—who referred only to the Plan amendment in the form announced on July 2, 1984.

Several employees, including plaintiffs, who were considering retirement under the window program asked their respective employee relations departments about possible exceptions to the $450,000 requirement. They were consistently told that no exceptions were possible.

On November 12, 1984, one of Mobil's executives prepared a "confidential memorandum" concerning plans for

administering the waiver clause. This document discusses "adverse comments" made to the IRS about the July 2, 1984 version of the Plan amendment by employees who were considering retirement under the window program. The IRS had responded to the employees, explaining only that the amendment "did not adversely affect the qualification of the Plan." This internal Mobil memorandum then expresses relief that the IRS had made "no mention of the additional amendment required by the IRS [i.e., the waiver clause]."

Mobil announced the IRS' approval of the Plan amendment to its employees on December 21, 1984—just ten days before the end of the "window" program. This announcement specifically referred to the July 2, 1984 announcement and implied that the IRS had approved the Plan amendment as announced in July. This December announcement also did not disclose the waiver amendment or the date of its adoption.

E. Mobil's Violations of ERISA § 510.

Plaintiffs and their fellow "window retirees" left Mobil on January 1, 1985, believing that the Plan amendment announced by Mobil the previous July had been approved by the IRS and without knowing that the true Plan amendment had been made in September 1984. Plaintiffs also retired not knowing of their right under the Plan amendment to apply for a waiver of the $450,000 requirement. Had plaintiffs known of the IRS rejection, they, through their unions and attorneys, would have learned that their rights to the lump sum benefit under the $250,000 test had been "grandfathered in" by the REA. Similarly, had plaintiffs known of the right to apply for a waiver, each would have done so, instead of forfeiting his job—especially if provided information about the purpose and intended operation of the waiver clause.

Mobil never did announce the true Plan amendment in the form adopted in September 1984. Instead, in October 1985, Mobil announced the "waiver clause," without specifying when it had been adopted and without explaining that it was part of the threshold amendment. Mobil made this announcement only to then-current employees. Plaintiffs did not discover Mobil's fraudulent conduct until late 1988, as a result of discovery and trial in a case brought by one of the "window retirees" in Colorado.[1]

II. COUNTERSTATEMENT OF PROCEEDINGS.

Plaintiffs brought this action on July 7, 1989, alleging that Mobil's conduct violated the Age Discrimination in Employment Act ("ADEA") and state law. Plaintiffs also asserted that if their state law claims were preempted by ERISA, then Mobil's conduct constituted a violation of ERISA, specifically § 510.

Mobil filed dispositive motions on all claims, including a motion to dismiss plaintiffs' ERISA claims on grounds that plaintiffs were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, and they therefore lacked standing to sue under ERISA. On June 22, 1990, the District Court granted summary judgment for Mobil on the ADEA claims, finding those claims barred by statutes of limitations. The trial court dismissed the state law claims based on ERISA preemption,

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[1] The Colorado action, denominated *Mitchell v. Mobil Oil Corp.*, Civil Action No. 86-Z-585, asserted claims for violation of the Age Discrimination in Employment Act, of ERISA, and of state law. Mitchell's theory was that Mobil's July 2, 1984 announcement itself worked a "constructive discharge" of Mitchell. Although Mitchell also offered evidence of Mobil's fraudulent conduct *after* the July 2, 1984 announcement—solely as a means of showing that the announcement was willful and intentional—he did not claim at trial that his retirement had been fraudulently procured. Ultimately, his "constructive discharge" theory failed under both ADEA and ERISA. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S.Ct. 252 (1990).

and it ruled that plaintiffs did not have standing to sue as "participants" under ERISA § 502(a).

The Fifth Circuit affirmed the ADEA ruling and the ERISA preemption ruling, but reversed and remanded the district court's dismissal of plaintiffs' ERISA claims. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992). The Court found that dismissal on the pleadings of the contingent ERISA claims was premature, as plaintiffs' allegations indicated that they may have been discharged in violation of § 510 and that, but for Mobil's nondisclosures, they would be covered employees with standing to sue under § 510. The Fifth Circuit observed that it was possible plaintiffs could *prove* facts that would establish standing under ERISA § 510. The Fifth Circuit also noted that plaintiffs had sought reinstatement on their ADEA claims, and did not affirmatively indicate that reinstatement was not also sought under their ERISA claims.

Upon remand, plaintiffs have amended their Complaint, asserting claims under § 510 of ERISA. They allege that Mobil fraudulently procured their involuntary discharges, by interfering with their ERISA-protected right to receive the lump sum benefit under the $250,000 test, by inducing them to believe that they could exercise their right to the lump sum only by giving up their jobs, and by concealing from them and thus preventing them from exercising their right under the Plan to apply for a waiver of the $450,000 requirement. Plaintiffs seek equitable relief pursuant to ERISA § 502(a)(3) in the form of a "make whole" remedy. The case is now proceeding in the District Court for the Eastern District of Texas.

REASONS FOR DENYING THE WRIT

(1) The means by which a former employee may establish or prove his standing, as articulated by the Fifth Circuit's decision in this case, are consistent with the

statutory definition of "participant" under ERISA § 3(7) and are not inconsistent with any applications of that definition by this Court or any of the other circuits.

(2) The Fifth Circuit's decision on standing does not threaten the certainty or uniformity of ERISA plan administration.

(3) Review of the Fifth Circuit's decision would be premature. The grounds for standing recognized by the Fifth Circuit require *proof* of an ERISA § 510 claim that *in and of itself* caused plaintiffs to cease being "current employees." Standing here is not based on a mere claim or allegation of standing. Ultimately, plaintiffs may or may not establish standing in the District Court, but in any event the proper time for review by this Court would be after the lower courts have fully adjudicated the issue.

(4) If the Court were to review the Fifth Circuit's decision on standing purely as a legal formulation, it would find, again, that the formulation is not inconsistent with any prior decisions of this Court or of the other circuits; however, the principles articulated by the Fifth Circuit have not been significantly developed by the lower courts. In fact, in related litigation, the District Court for the District of Colorado on July 21, 1992 certified the very issue presented here for interlocutory review by the Tenth Circuit Court of Appeals under 28 U.S.C. § 1292(b). [32a.]

I. THE CONTROLLING STATUTORY PROVISIONS.

ERISA is comprehensive remedial legislation intended to provide the full range of legal and equitable remedies to redress and prevent violation of its provisions. S.Rep. No. 93-127, 93d Cong., 2d Sess., Reprinted in 1974 U.S. Code Cong. and Ad. News at 4871. As pertinent here, standing to bring civil actions to enforce ERISA rights and to redress violations is afforded to a "participant" of an employee benefit plan. ERISA § 502(a)(1) & (3),

29 U.S.C. § 1132(a)(1) & (3). A participant, as defined by ERISA § 3(7), is "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." (emphasis added). 29 U.S.C. § 1002(7).

Under § 3(7), current employees who are eligible or who in the future may become eligible for plan benefits are "participants" for standing purposes. A former employee "may become eligible for benefits," and is therefore a "participant," if he has a "reasonable expectation of returning to covered employment" or a "colorable claim to vested benefits." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986).

In relevant part, ERISA § 510 provides:

> It shall be unlawful for any person to discharge . . . a participant . . . for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this Subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this Subchapter. . . . 29 U.S.C. § 1140.

Mobil contends that a former employee cannot be a "participant" under this or any other provision of ERISA if he has received all the benefits he earned through the date he left "covered employment"—regardless of whether his departure was caused by his employer's violation of § 510. Mobil asserts that the only "exception" to this "rule" is where the former employee asks his employer to reinstate him before he sues under ERISA. Under that "exception," the presuit request for reinstatement, according to Mobil, may represent a "reasonable expectation of returning to covered employment," but only if the reinstatement would allow the employee to "satisfy eligibility requirements" for a benefit not satisfied before his wrongful discharge.

These are the "rule" and the "exception" Mobil urged below and which it advances on its Petition. But neither the decisions of this Court nor of the circuits support the "rule" or the "exception."

II. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH FIRESTONE AND THE ONLY INTERPRETATION OF FIRESTONE CONSISTENT WITH SECTION 510.

Under Mobil's argument, many persons who might be harmed by conduct proscribed by § 510 would lack standing to sue under that section. Any employee discharged for exercising his right to a fully vested ERISA benefit necessarily would have already received the vested benefit. He would no longer have a "colorable claim for vested benefits." He would not have a "reasonable expectation of returning to covered employment" to "attain eligibility for the benefit" because he had already obtained eligibility. Also, his expectation of returning to covered employment could be defeated by the employer or by circumstances entirely beyond the participant's control (e.g. if the employer goes out of business), making his request for reinstatement "unreasonable."

To illustrate, an employer offering a health plan and maternity leave as its only ERISA benefits might intentionally discharge a female worker immediately after her return from maternity leave, for exercising her ERISA rights. At the time of her discharge, she had received all earned and vested benefits, yet her discharge is obviously violative of § 510. She would lack standing, according to Mobil, however, because she would have no claim, colorable or otherwise, for "vested benefits" and no expectation of attaining eligibility for a vested benefit in the future. Additionally, if the circumstances of her discharge or events subsequent to the discharge made her reinstatement unlikely or an "unreasonable expectation," then she would lack standing on this ground as well.

Such a construction of *Firestone* would vitiate § 510 and allow the employer, through his own conduct viola-

tive of § 510, to defeat the employees' standing to remedy the violation. The Fifth Circuit recognized this, and thus rejected Mobil's restrictive interpretation of *Firestone*—the same interpretation advanced in its petition here. In doing so, the court used the plaintiff in *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990), as an example, not unlike the female employee discharged after returning from maternity leave:

> The Supreme Court's recent *McClendon* decision held that [Section 510] would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. . . . The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee would be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. 950 F.2d at 1221 (citations omitted).

The Fifth Circuit recognized that, at the time of the alleged § 510 violation, each of these plaintiffs were "participants" in Mobil's Retirement Plan, and their standing to sue for that alleged violation cannot be defeated by the violation itself. Either their standing is to be determined *as of time of the wrongful acts*, i.e. when they were still "current employees" and thus "participants," or they must be treated in law as if they *had never left covered employment.*

Stated another way, if plaintiffs can prove the § 510 claims they allege, then they—as a matter of law—have continued to earn or accrue vested benefits, i.e., additional pension accumulations, which were not paid to them. Accordingly, they would *then* have claims for vested benefits not paid. Also, plaintiffs would *then* have more than merely a "reasonable expectation of returning to covered employment." They would have proven that they never should have lost their jobs in the first place.

III. THE FIFTH CIRCUIT'S OPINION DOES NOT CREATE STANDING BY A MERE ALLEGATION OR CLAIM OF STANDING.

Mobil's petition misapprehends an important aspect of the Fifth Circuit's decision in this case. The Fifth Circuit held that plaintiffs may establish standing to sue under § 510 only if they prove that their status as "former employees" was the result of a § 510 violation and not the result of their own actions. *See especially*, 950 F.2d at 1222. In other words, plaintiffs are required to show that their apparently conscious decision to take early retirement was in fact a fraudulently procured discharge in which plaintiffs' "conscious choice" was effectively negated by fraud. Proof of such fraud is required to render the "early retirements" truly involuntary in the same sense that the outright firing in *McClendon* was involuntary.

Thus, plaintiffs' standing is not established by a mere *claim* of fraudulent discharge. It requires proof of the violation:

> [T]he standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. 950 F.2d at 1222 (emphasis added).

Thus, the Fifth Circuit did not run afoul of the principles in *Firestone* that plaintiffs either are or are not "participants" and that they cannot establish their status as "participants" by merely alleging or claiming that status. Here, the plaintiffs either are or are not participants—depending upon whether they *actually prove* that they would not have left covered employment but for Mobil's fraud in violation of § 510.

Requiring proof of an underlying violation as a prerequisite to standing, so that standing cannot be determined except upon the merits of the case, is not foreign to the law. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, n.31 (1979) ("it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence at trial."); *Barrett Computer Services, Inc. v. PDA, Inc.*, 884 F.2d 214, 218-19 (5th Cir. 1989) (". . . in cases in which the merits of the claims asserted are intertwined with the jurisdictional issue of standing challenges to standing are frequently resolved in summary judgment proceedings . . . or at a trial on the merits.") *See also, Henry v. Black & Decker Inc.*, 779 F. Supp. 778, 784, n.4 (D.N.J. 1991).

In this case, the merits of respondents' ERISA claim are inextricably intertwined with the question of standing. The Fifth Circuit, in fact, held that: "[w]e emphasize that we have not determined that appellants will be able to establish a violation of § 510, only that they should be allowed to do so." [25a.]

IV. THE FIFTH CIRCUIT'S OPINION DOES NOT ALTER THE STATUTORY DEFINITION OF "PARTICIPANT," BUT DOES RECOGNIZE THAT THE PROOF REQUIRED TO MEET THE DEFINITION DIFFERS DEPENDING UPON THE NATURE OF THE ERISA CLAIM ASSERTED.

Judicial interpretation of ERISA standing has developed, not under § 510, but in the context of claims for breach of plan obligations—failure to provide plan documents,[2] denial of benefits,[3] or failure to meet fiduciary obligations.[4] Unlike § 510 claims, such claims arise from the contractual rights created by benefit plans and have their genesis in pre-ERISA jurisprudence: prior to ERISA, actions challenging denial of benefits and other

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[2] 29 U.S.C. §§ 1132(a)(1)(A) and (C); *see, e.g., Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101; *Winchester v. Pension Committee*, 942 F.2d 1190 (7th Cir. 1991); *Flick v. Borg-Warner Corp.*, 892 F.2d 285 (3d Cir. 1989); *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986); *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473 (2d Cir. 1985); *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285 (5th Cir. 1980); *Buchanan v. Foster Elec. Co.*, 1989 WL 157340 (N.D. Ill. 1989); *Hager v. Veco Corp.*, 1 Employee Benefits Cas. (BNA) 1827 (N.D. Ill. 1979).

[3] 29 U.S.C. § 1132(a)(1)(B); *see, e.g., Firestone v. Bruch*; *Boren v. Southwestern Bell Telephone Co., Inc.*, 933 F.2d 891 (10th Cir. 1991); *Teagardner v. Republic-Franklin, Inc. Pension Plan*, 909 F.2d 947 (6th Cir. 1990); *Flick v. Borg-Warner Corp.*, 892 F.2d 285; *Yancy v. American Petrofina, Inc.*, 768 F.2d 707 (5th Cir. 1985); *Freeman v. Jacques Orthopaedic and Joint Implant Surgery*, 721 F.2d 654 (9th Cir. 1983); *Deller v. Portland General Elec. Co.*, 727 F. Supp. 1369 (D. Or. 1989).

[4] 29 U.S.C. §§ 1109, 1132(a)(2); *see, e.g., Flick v. Borg-Warner Corp., Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345 (5th Cir. 1989); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986); *Kuntz v. Reese; Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628 (5th Cir. 1985); *Gilquist v. Becklin*, 675 F. Supp. 1168 (D. Minn. 1987).

pension plan rights were governed by principles of contract law. *Firestone*, 489 U.S. at 112.

The conduct prohibited by § 510 is not merely the failure to meet plan obligations; a § 510 claim requires interference with the employment relationship, with a specific intent to prevent attainment or to interfere with the exercise of a right under ERISA or an ERISA-governed plan. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851-52 (3rd Cir. 1987); *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889, 893 (3rd Cir. 1986). Thus, claims alleging violation of § 510 are more akin to common law actions in tort for wrongs to the employment relationship. *See, Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991) (recognizing that § 510 "was designed to protect the employment relationship which gives rise to an individual's pension rights."); *Vogel v. Independence Federal Savings Bank*, 692 F.Supp. 587, 595 (D.Md. 1988) (§ 510 creates the statutory equivalent of tortious interference claim); *see also, Vogel*, 728 F. Supp. 1210, 1218 n.18 (D. Md. 1990).

Section 510 was enacted to prevent interference with the attainment or exercise of *any* right or benefit to which a participant may become entitled, including the opportunity to accrue additional benefits through continued employment. *See, e.g., Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991). And since the prohibitions of § 510 are not limited to conduct that result in deprivation of benefits, but reaches as well conduct that harms the employment relationship, a § 510 plaintiff need not present a claim for benefits at all. *Zipf*, 799 F.2d at 893; *see also, McClendon*, 111 S.Ct. at 486.[5]

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[5] Mobil cites *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) for the proposition that only "benefits" are recoverable on a claim under ERISA. Petition at 16. *Russell* held that under § 1132(a)(2), an individual may bring a § 1109 suit for breach of fiduciary duty to recover on behalf of the plan, but not for losses he

It is therefore not surprising that a wrongfully discharged employee may prove that he has a "colorable claim for vested benefits" and thus standing by a showing that is different from the showing required a plaintiff suing for the denial of benefits or for plan information. The § 510 plaintiff may be considered a "current employee," as a matter of law, or his standing as a "participant" may be determined as of the time the tort was committed. He may prove that he should never have lost his job, and upon such proof, establish a claim for vested benefits he has earned in law though not in fact.

This does not mean that the statutory definition of "participant" is different in a § 510 case, but it does mean that the proof required to meet the definition may indeed be different in a § 510 context than in a benefits denial context.

The same result obtains under the other prong of the *Firestone* formulation, i.e., whether the "former" employee has a "reasonable expectation of returning to covered employment." The fact that a § 510 plaintiff does not precede his suit by asking his employer to rehire him cannot defeat his standing to bring an ERISA § 510 claim.[6] Reinstatement, whether through an informal, pre-suit request for reemployment or otherwise, is not a pre-

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has personally incurred. The majority opinion in *Russell* states that the Court was not considering whether any other ERISA provision —such as § 510—authorized recovery of extracontractual relief. *Vogel*, 692 F. Supp. at 595, citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 139, n.5, 105 S.Ct. at 3088 n.5; *see also, Vogel*, 728 F. Supp. at 1218.

[6] Here, as the Fifth Circuit noted, respondents *did* request reinstatement in connection with their age discrimination claim, indicating that respondents "do desire court-ordered reinstatement." [21a.] On remand, they have also requested reinstatment on their ERISA § 510 claims—which defeats Mobil's argument against standing in this case in any event. *See, Mitchell*, 896 F.2d at 474; Christopher, 950 F.2d at 1223.

requisite to a cause of action under § 510.[7] And the remedies provided by § 510 were designed to be administered by the courts, not by the employer or the plan administrator. *Zipf v. American T & T*, 799 F.2d at 892, citing 2 Legislative History of the Employee Retirement Income Security Act of 1974, 1641-42 (1976).[8]

Indeed, given the nature of the conduct actionable under § 510, a pre-suit request to be rehired is likely an exercise in futility. Where employment has terminated because of conduct in violation of § 510, reinstatement may be a practical impossibility due to the former employee's age, illness or injury (whether related to the prohibited conduct or not), hostility, or dissolution of the employer's business. If the employee asks the employer for reinstatement, and the employer rejects the request, saying there is "no chance" of reinstatement, then can the employee ever prove a "reasonable expectation of returning to covered employment?"

The Fifth Circuit's opinion in this case recognizes, in effect, that "equitable" or constructive reinstatement is the only realistic alternative in such cases. Section 510

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[7] *See, e.g., Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991); *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, 672 (3rd Cir. 1988), *vacated and remanded*, 489 U.S. 1049, *on remand*, No. 87-5144, slip op. (3rd Cir. June 29, 1989); *Fischer v. Philadelphia Electric Co.*, 1991 WL 36215, at p. 5; *Conkwright*, 739 F. Supp. 1006, *aff'd*, 933 F.2d 231 (4th Cir. 1991); *Nemeth v. Clark Equipment Co.*, 677 F. Supp. 899, 908 (W.D. Mich. 1987); *Garry v. TRW, Inc.*, 603 F. Supp. 157, 164 (N.D. Ohio 1985); *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1016 (W.D. Mo. 1984); *Bittner v. Sadoff & Rudoy*, 490 F. Supp. 534, 536 (E.D. Wis. 1980); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 360 (E.D. Mo. 1979).

[8] In *Zipf*, the Third Circuit held that the plaintiff was not required to submit her § 510 claim (which included a request for reinstatement, back pay and other restitutionary relief) to the plan for administrative determination. In so holding, the court drew a distinction between a claim under § 510 and contractual claims for benefits or other contract-based rights under other provisions of ERISA. 799 F.2d at 892.

contemplates that federal courts will fashion equitable, "make whole" remedies—in effect treating the wrongfully discharged employee as though he had never been terminated. *See*, *Folz v. Marriott*, 594 F.Supp. at 1015; *Bittner v. Sadoff & Rudoy Industries*, 490 F.Supp. at 536 (under the equitable power afforded the courts by ERISA, the court is not limited in its ability to award relief to mere restoration of pension plan benefits, but has equitable power to put plaintiff "back into the position he enjoyed before the discharge."); *accord*, *Fleming v. Ayers & Associates*, 948 F.2d 993, 998 (6th Cir. 1991), citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19.

This Court's decision in *McClendon* reaffirms the availability of the full panoply of equitable remedies to redress § 510 violations. Although *McClendon* did not address the question of standing, this Court held that where a former employee has been discharged in order to defeat pension rights and he seeks—not benefits—but lost wages and other compensatory relief, his remedy is not under state law but under ERISA § 510:

> There is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here [including loss wages and other "extracontractual" relief] is well within the power of the federal courts to provide.

111 S.Ct. at 486.[9]

McClendon requested neither an award of unpaid, vested benefits nor reinstatement of his employment. He

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[9] The Fifth Circuit did not hold or even imply that *McClendon* overruled or "superseded sub silentio" *Firestone*. The Fifth Circuit merely reasoned that Mr. McClendon would have standing to sue under the ERISA claim this Court said he possessed—under § 510. That conclusion merely buttressed the circuit court's construction of *Firestone* in the context of a § 510 claim. The Fifth Circuit's opinion is consistent with both *McClendon* and *Firestone*, and these two opinions are consistent with each other.

had neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment, but he nonetheless had suffered an injury for which § 510 provided a remedy.

McClendon, like the plaintiffs here, could establish his standing if he proved his § 510 claim. Either his standing was to be determined at the time the tort (i.e., the § 510 violation) occurred, or, upon proof of the violation, he could demonstrate his status in law as a "current employee." And even as a former employee in fact, upon proof of the violation, he could establish a claim for unpaid benefits and far more than a mere "expectation of returning to covered employment." [10]

In sum however the Fifth Circuit's standing decision is analyzed, it is consistent with the definition of "participant" under ERISA § 3(7), and it is not inconsistent with *Firestone* or, as demonstrated in the next section, any of *Firestone's* progeny in the other circuits.

V. THE FIFTH CIRCUIT'S DECISION IS NOT INCONSISTENT WITH PRECEDENT IN OTHER CIRCUITS.

The Fifth Circuit's analysis of standing in this case is not inconsistent with *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S.Ct. 252 (1990), or with the decisions of other circuits on ERISA standing. The requirement that plaintiffs here prove they were involuntarily discharged as a result of fraudulent misrepresentations distinguish the cases Mobil cites. As the Fifth Circuit observed:

> . . . [Plaintiffs'] allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's non-

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[10] *See, e.g., Folz v. Marriott*, 594 F. Supp. at 1016; *Saporito v. Combustion Engineering, Inc.*, 843 F.2d at 672; *Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. at 536.

> disclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case from both *Yancy* and *Mitchell*.

Christopher, 950 F.2d at 1223. As the court adduced, it is the involuntariness of plaintiffs' termination that may and, with proof, will distinguish this case from those which Mobil claims are inconsistent with the Fifth Circuit's opinion. *See and compare, Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 709 (5th Cir. 1985). The *Mitchell* and *Yancy* plaintiffs exercised a knowing and legally voluntary (albeit unwanted) choice to retire and accept a lump-sum payment of their vested benefits in lieu of continuing employment and later challenging their employer's conduct. *See especially*, 950 F.2d at 1227. That defeated their standing. Here, the plaintiffs made no such knowing choice. They were defrauded out of their jobs—the legal equivalent of an outright firing. But that is what they must *prove* in order to have standing.

Similarly, in *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986) and in *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 724 F.2d 654 (9th Cir. 1983)—both pre-*Firestone* cases—the issue was whether an employee who had never been a "participant" in the ERISA plan from which he was claiming benefits could be treated as one if he *claimed* that he would have become a "participant" but for the employer's alleged fraud. Aside from the fact that neither case is a § 510 discharge case, both make the very point articulated in *Firestone* and followed by the Fifth Circuit in this case: a person either is or is not a "participant." A mere allegation or claim that he would have had such status but for his employer's actions (or any other circumstance for that matter) does not establish standing. Proof of the actual status is required. *See also* and *com-*

pare, Winchester v. Pension Committee, 942 F.2d 1190, 1193 (7th Cir. 1991) (mere assertion of claim to reinstatement is not sufficient to establish a "reasonable expectation of returning to covered employment" and thus standing); *Teagardener v. Republic-Franklin Incorporated Pension Plan*, 909 F.2d 947, 949-50 (6th Cir. 1990) (former employees not entitled to additional benefits accruing from termination of retirement plan after they voluntarily retired and ceased to be "participants").

None of the cases cited by Mobil are inconsistent with the Fifth Circuit's decision in this case.

VI. THE CIRCUIT COURTS HAVE ONLY RECENTLY BEGUN TO ADDRESS THE ISSUE PRESENTED HERE.

As the Fifth Circuit's decision reveals, the circuits have only begun to articulate the principles of standing applied below. In *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991), the Court followed prior law in holding that the former employees did not have standing to sue for the denial of additional benefits where they had retired and accepted all their earned benefits in a lump sum and had not asked for reinstatement. But on the § 510 claim, the court held:

> Of course, we recognize that if the employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy.

The Third Circuit has voiced similar concepts in *Saporito v. Combustion Engineering, Inc.*, No. 87-5144, slip op. at 5 (3rd Cir. June 29, 1989), *on remand*, 489 U.S. 1049 (1989), after remand from this Court to reconsider standing in light of *Firestone*. On remand, the court reaffirmed an even broader principle than that applied by the Fifth Circuit in this case:

> By its very nature a § 510 claim will often involve employees who claim that they did not receive benefits

> because of the employer's actions, and thus were denied an opportunity to become participants in the benefits. To require that the employees have the status of participants where they allege that the employers' acts effectively deprived them of such status would undercut the provision [i.e., § 510] and cannot have been intended by Congress.

Other courts have reached the same result, but without necessarily articulating the means of establishing standing in the same terms used as the Fifth and Third Circuits. *See, e.g., Jones v. AT & T Co.*, 1992 WL 68266, at 5 (E.D. Pa. 1992); *Fischer v. Philadelphia Elec. Co.*, 1991 WL 36215 (E.D. Pa. 1991); *Young v. AT & T Transition Protecton Payment Plan*, 1989 WL 675, at 1 (D.N.J. 1989) (former employee may maintain § 510 action where employer made false representations inducing employee's involuntary resignation and thereby depriving him of early retirement benefits available in plan which was announced the day after his separation from employment); *Deller v. Portland General Elec. Co.*, 727 F.Supp. 1369, 1371 (D. Or. 1989) (plaintiffs who received lump sum payment of vested retirement benefits upon termination may state claim under § 510 by showing that but for employer's discriminatory conduct in calculating termination dates they would have been employed and eligible on date improved retirement benefits were made available).

As mentioned earlier, the issue presented here has recently been certified for interlocutory appeal under 28 U.S.C. § 1292(b)—at Mobil's request—in the related case of *Raymond v. Mobil Oil Corp.*, Civil Action No. 88-Z-2112, pending in the U.S. District Court for the District of Colorado. In *Raymond*, a certified class action of "window" retirees, the District Court ruled that the Fifth Circuit's decision in this case is not inconsistent with *Mitchell*. If the Tenth Circuit grants Mobil's petition for immediate review, it will then rule on the issue. If the Tenth Circuit were to reverse the District Court's ruling, then a conflict would exist between the circuits.

In the meantime, the ERISA § 510 claims in this case are now before the District Court and should be resolved on their merits in due course. If plaintiffs establish their standing to the District Court's satisfaction, the issue in this case may return to the appellate courts—by which time the Tenth Circuit and perhaps other circuits will have also decided the issue. The lower courts should be permitted to more fully develop the law on this issue before this Court exercises its discretionary review jurisdiction. *See also, Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990); *Healy v. Axelrod Const. Co. Pension Plan & Trust*, 787 F. Supp. 838, 844-45 (N.D. Ill. 1992) (noting that the "exact perimeters of [Section 510] have not been fully developed judicially.").

VII. THE FIFTH CIRCUIT'S OPINION DOES NOT CREATE "UNCERTAINTY" OR "INCONSISTENCY" IN THE ADMINISTRATION OF ERISA PLANS.

Mobil contends that the Fifth Circuit's standing analysis will impair the "delicate balance" between the protection of employee benefits and the costs of administering benefit plans. Mobil's argument emphasizes only one purpose of ERISA—to protect benefits—to the exclusion of the purpose for which § 510 was enacted: protection of the employment relationship that gives rise to the benefits. *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir. 1987); *Garry v. TRW, Inc.*, 603 F.Supp. 157, 162 (N.D. Ohio 1985); *Donahue v. Custom Management Corp.*, 634 F.Supp. 1190, 1197 (W.D. Pa. 1986).

Congress viewed § 510 as a crucial part of ERISA because without it employers would be able to "circumvent the provision of promised benefits." *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. at 485 (1990). Section 510 was enacted "to prevent unscrupulous employers from discharging or harassing their employees in order to prevent them from obtaining their statutory or plan-based

rights." *Zipf v. AT&T*, 799 F.2d at 891, citing *West v. Butler*, 621 F.2d at 244-46.

Mobil attempts to create a gap between preemption and standing that was not intended by Congress. By its holding in *McClendon*, this Court reaffirmed that ERISA is intended to provide a federal remedy for what previously could only be litigated as a wrongful discharge claim under state law. But this does not imply that employers are now free to engage in fraud and concealment to procure the "retirement" of their employees with the intent to deprive them of benefits or other rights under a plan. Under Mobil's analysis, as long as employers can dupe employees into accepting payment of their *currently* accrued benefits, immunity from § 510 claims would be guaranteed. And terminated employees, because of preemption, would be left without state-law claims to redress the employer's misconduct.

Mobil would eviscerate the protections provided by § 510 in the name of administrative expense, legal predictability, and certainty of plan obligations. But the Fifth Circuit's decision does not increase the legal or administrative burdens on ERISA plans or employers. The legal obligation of the plan and the employer to employees under § 510 is to refrain from the conduct prohibited by § 510.

By definition, the means of proving "participant" status recognized by the Fifth Circuit applies only to § 510 claims, and only to a limited, fact-specific subclass of § 510 cases—where the employer has taken prohibited action against the employee *and* the prohibited conduct has itself divested the employee of his status as a current employee. The opinion does not confer standing on every former employee who has "second thoughts" about his early retirement.

The Plan's obligations to former employees remain unchanged. Former employees asserting claims for denial of benefits, for enforcement of plan obligations, or for

refusal of plan information must continue to meet the "colorable claim" or "reasonable expectation" tests established by Firestone. Section 510 claimants must also meet those tests, but they may do so by proof that the alleged § 510 violation did occur and that the violation is the reason they are no longer current employees in fact.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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July 27, 1992

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit, January 24, 1992

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4562

Jan. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Plaintiffs-Appellants,

—v.—

MOBIL OIL CORPORATION, RETIREMENT PLAN OF MOBIL OIL CORPORATION and REX ADAMS,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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Before:

HENLEY,* KING, and GARWOOD,
Circuit Judges.

GARWOOD, *Circuit Judge*:

Appellants brought claims under the Age Discrimination in Employment Act (ADEA) and the Employee Re-

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* Circuit Judge of the Eighth Circuit, sitting by designation.

tirement Income Security Act (ERISA), as well as various common-law claims including fraud, civil conspiracy, and breach of the employment contract, against their former employer Mobil Oil Corporation, based on Mobil's 1984 amendment of its employee benefit plan and alleged failure to disclose to appellants all of the options available under the amended plan. The district court granted Mobil's motion for summary judgment on the ADEA claims on the grounds that the claims were time-barred and that as a matter of law appellants were not constructively discharged in violation of ADEA. The district court also granted Mobil's request for judgment on the pleadings on appellants' state law claims on the ground that they were preempted by ERISA, and dismissed the ERISA claims on the ground that because appellants were not participants seeking to recover benefits from a retirement plan, the court lacked jurisdiction over their ERISA claims. We affirm in part and reverse and remand in part.

Facts and Proceedings Below

The following facts are drawn from the parties' submissions of undisputed facts in connection with Mobil's motions for summary judgment, judgment on the pleadings, and dismissal.

Mobil provides retirement benefits for its employees through a defined benefit plan, under which employees receive a pension based on years of service, salary history, and life expectancy. Until 1977, the standard method of receiving these pensions was in the form of an annuity. In that year, however, Mobile [sic] added a lump sum option, enabling certain employees to receive the actuarial equivalent of their annuity, discounted at five percent, in one payment following retirement. To be eligible for the lump sum option, an employee had to have either an accrued lump sum pension benefit, or a net worth independent of the pension, equal to at least

$250,000. Also, the employee was required to be at least fifty-five years old.

On July 2, 1984, Mobil announced changes to the lump sum option of the retirement plan, including (1) an increase in the discount rate from 5% to 9.5%, to operate prospectively, *i.e.*, to be applied to all earnings after January 31, 1985; (2) an increase in the eligibility threshold from $250,000 to $450,000; and (3) a linking of the new threshold to the Consumer Price Index. These changes, which were announced as subject to Internal Revenue Service (IRS) approval, would apply to all employees retiring after January 31, 1985; thus, employees otherwise eligible to retire had a six-month window in which they could retire subject to the lower threshold and lower discount rate. The choice was a significant one for employees who met the $250,000 threshold but who were uncertain ever to meet the indexed $450,000 threshold because, with market interest rates well above 5%, the lump sum pensions were worth 40% more than the annuities. Appellants, Gerald Christopher, Charles Prunty, and Billy Turner, were among the approximately 1,100 Mobil employees who elected to take early retirement during the 6-month window. All three submitted their retirement notices between August and October 1984, and retired as of January 1, 1985.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401(a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Washington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility

threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its employees of the waiver provision until well after expiration of the six-month window—October 1985. Because of a 1985 IRS revenue ruling and subsequent pronouncements, Mobil eventually entirely deleted the lump sum eligibility threshold in 1986.

Appellants filed age discrimination charges against Mobil with the Equal Employment Opportunity Commission (EEOC) on March 1, 1989. They alleged that Mobil's conduct in amending the plan and concealing the waiver provision was a concerted scheme to reduce its work force. By purporting to increase the lump sum threshold and concealing its awareness that applicable tax law precluded that action, appellants charged, Mobil induced hundreds of older employees into retirement without the need to pay them an early retirement bonus. The EEOC dismissed the charges as untimely filed. Appellants then commenced this suit on July 7, 1989. They alleged that Mobil's conduct constituted age discrimination in violation of ADEA, 29 U.S.C. §§ 621 *et seq.*, as well as common-law fraud, civil conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence. In the event that appellants' state law claims were held to be preempted by ERISA, the complaint alleged in brief and conclusory fashion that Mobil's conduct violated ERISA, apparently ERISA § 510, 29 U.S.C. § 1140, prohibiting interference with an employee's attainment of a right under ERISA. For all claims, appellants sought the wages and employment benefits they would have received had they continued working until normal retirement age.

On the ADEA claims, appellants also requested reinstatement.

Mobil moved for summary judgment on the ADEA and state law claims. The district court granted the motion, finding that the ADEA and state law claims were time-barred, that appellants had not been constructively discharged in violation of the ADEA, and that appellants' claims of discrimination arose from changes in fringe benefits available under a bona fide retirement plan, not from discrimination in nonfringe aspects of employment, and thus were not within the purview of the ADEA according to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). Simultaneously, Mobil moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the state law claims on the ground that they were preempted by ERISA, and dismissal under Federal Rules of Civil Procedure 12(b)(1) & (6) of the contingent ERISA claim on the ground that appellants were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, depriving the court of jurisdiction. The district court granted this motion as well.

Discussion

I. ADEA Claims

We first examine the district court's grant of summary judgment on the ADEA claims on the ground that they were time-barred. In reviewing a grant of summary judgment, all legitimate factual inferences presented by the record are drawn in favor of the party opposing the motion. *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990) (per curiam). We can uphold the summary judgment only if our review demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

It is not disputed that the applicable statutes of limitations require an employee to file an age discrimination

charge with the EEOC within 300 days after the alleged unlawful practice occurred, 29 U.S.C. § 626(d)(2), and to file a lawsuit within 3 years after the alleged unlawful practice occurred, 29 U.S.C. §§ 255(a), 626(e). Appellants argue, however, that a genuine issue of material fact exists as to when their awareness of the facts constituting the alleged age discrimination was sufficient to commence the running of the limitations period. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986) ("[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with reasonably prudent regard for his rights." (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975))). Specifically, they argue that Mobil's negotiation of a revised plan in October 1984 only came to light in 1988 when counsel for another former employee, Porter Mitchell (Mitchell), suing Mobil in federal district court in Colorado, discovered the correspondence between Mobil and the IRS. It was only when this fact became publicly known at the trial of *Mitchell v. Mobil Oil Corp.* in December 1988,[1] appellants argue, that they had any reason to know of Mobil's concealment of the

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[1] The alleged fraud was not part of Mitchell's claims against Mobil. He argued, rather, that the plan amendment itself constituted a constructive discharge and was a willful violation of the ADEA. He also argued that Mobil had breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, and had violated ERISA's anti-cutback provision, ERISA 204(g), 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump sum option, an accrued benefit. The jury found in favor of Mitchell on his ADEA claim and awarded him damages for back pay, front pay, and lost benefits. The district court held in favor of Mitchell on the ERISA claims as well, awarding him compensatory and liquidated damages. On appeal, the Tenth Circuit reversed, holding that Mitchell had failed to prove that Mobil's proffered justification for the plan amendment was a mere pretext for discrimination, and that Mitchell was not a participant with standing to assert ERISA claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-74 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

waiver option. Appellants' EEOC filing in March 1989 and their commencement of this suit in July 1989 would both have been timely if the statute of limitations had commenced running in December 1988.

Evaluating the appellants' claim that the statute of limitations did not commence until December 1988 requires an analysis of the nature of their ADEA claim. The ADEA forbids an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A "discharge" within the meaning of this section may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An attractive early retirement offer, however, is not a constructive discharge merely because it creates a strong incentive to retire; an early retirement option can constitute a constructive discharge only if the employee shows that it sufficiently alters the status quo that each choice facing the employee makes him worse off. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990); *Bodnar*, 843 F.2d at 193.

The gist of appellants' *prima facie* ADEA claim is as follows. The adoption of the 1984 plan amendment presented appellants with a choice between unfavorable options; they faced the choice of retiring within the six-month window or staying on at Mobil but possibly forgoing eligibility for the lump sum payout. Either could be regarded as less favorable than staying on at Mobil until normal retirement age with the assurance of eligibility for the lump sum payout, which was the "status quo" when the amendment was adopted. The asserted discriminatory character of the amendment to the plan

arises from the fact that only employees over the age of fifty-five were put to that choice. Employees under fifty-five did not presently qualify for retirement, so although the plan amendment may have defeated an expectation for them, they were not confronted with the possibility of losing a benefit for which they were then qualified. *See Mitchell*, 896 F.2d at 496.

This much of the ADEA theory was evident in July 1984 upon the initial announcement of the plan. The unfavorable choice to which it put "window" employees and its particular impact on employees over fifty-five were both apparent on the face of the plan amendment. Indeed, the theory outlined above was precisely Mitchell's claim against Mobil, accepted by the Tenth Circuit. Mitchell filed a complaint with the EEOC on April 25, 1985, with no knowledge of Mobil's alleged concealment of the waiver provision. Moreover, another employee, Frederic J. Raymond (Raymond), filed a similar charge with the Ohio Civil Rights Commission and the EEOC on May 10, 1985. Therefore, unless appellants can show that Mobil's alleged concealment adds a material element to their ADEA claim, the statute of limitations should have commenced running in July 1984.

Appellants have offered no theory under which the alleged nondisclosure is a necessary element. They refer us to the Fourth Circuit case of *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988), for their argument that "where, as here, the employee surrenders his job as a proximate result of fraud and deceit by the employer, the voluntariness of the retirement or resignation is fundamentally vitiated." *Stone* is one of a series of cases where resignations have been held to be involuntary based on an employer's misrepresentations about or nondisclosure of an employee's rights. Others include *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed. Cir.1984), and *Scharf v. Department of the Air Force*, 710 F.2d 1572 (Fed.Cir.1983).

We do not believe that these cases avail appellants, however. As appellants' phrasing of their argument reflects, the effect of a showing of fraud in these cases is to render an otherwise voluntary choice involuntary. *Stone* and related cases involve disputes in which public employees were entitled to certain procedural protections if they were to be terminated involuntarily; they were required to show that their retirement was involuntary to invoke the jurisdiction of the Merit Systems Protection Board or to establish a "deprivation" under the due process clause. Here, by contrast, appellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option. Assuming, *arguendo* only, that appellants' allegations of nondisclosure would serve to estop Mobil from raising in defense the claim that appellants' retirement was voluntary, nevertheless the asserted nondisclosure does not form a material part of appellants' constructive discharge theory that would prevent the statute of limitations from commencing.

Appellants' arguments that this Court should apply equitable tolling or equitable estoppel fail for similar reasons. These doctrines provide for tolling of the statute of limitations when a plaintiff's unawareness of his ability to bring a claim—either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights—is due to defendant's misconduct. *See Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 198, 116 L.Ed.2d 158 (1991); *Kale v. Combined Insurance Co.*, 861 F.2d 746, 752 (1st Cir. 1988). Here, the knowledge allegedly concealed from the employees was that they had a third option—to continue their

employment and apply for a waiver from the higher lump sum requirement. Therefore, the facts as known to the employees in 1984 actually gave them a *better* ADEA claim than they would have had with full knowledge. Whatever nondisclosures Mobil is guilty of would not have lulled appellants into postponing assertion of their rights; if anything, it would have made them *more* likely to assert that they were constructively discharged.

Finally, appellants argue that although they knew in 1984 of the plan amendment and retirement window, they were misled into believing that they had no cause of action by Mobil's plausible justifications for its amendment of the plan, *i.e.*, that the threshold was changed to adjust for intervening inflation and that the discount rate was raised to align Mobil's practice with that of its competitors and to more realistically reflect current interest rates. In other words, appellants contend that although the discriminatory *effect* of the amendment was apparent in 1984, it was only upon learning of the concealment of the waiver option that they had reason to believe the plan amendment was actuated by age bias and that the alleged concerted scheme to reduce the work force began to take shape.

We find this argument unpersuasive as well. First, we fail to see how the deception alleged by appellants calls into question Mobil's proffered justifications for the plan amendment. The evidence does not create a genuine dispute as to the factual accuracy of Mobil's proffered justifications. Even if appellants' allegations are true respecting Mobil's having deceived its employees about the validity under applicable tax law of the plan amendment and about the waiver provision, there is no evidence showing that Mobil's announced reasons for the plan amendment were deceptive. This is an issue on which appellants would have had the burden at trial, and they were hence required to meet Mobil's summary judgment motion with summary judgment evidence that would sus-

tain a jury finding in their favor on the issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 644 (5th Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989).

In any event, a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose. Thus, where an employee was told that he was being discharged because industry economic downturn required reduction of the work force, and was told that he would be considered for re-hiring, we applied equitable estoppel to hold that limitations on his ADEA claim did not commence until he learned that he had been replaced by a younger employee. *Rhodes*, 927 F.2d at 880-82; *see also Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir.1981) (en banc) (employer's misrepresentation that employee would be reinstated induced foreseeable forebearance in filing ADEA claim); *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir.1983) (employer's explanation to employee that he was dismissed as part of a reorganization furnished grounds for equitable tolling in an ADEA suit until discharged employee learned that a younger replacement had been hired), *cert. dismissed*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). By contrast, where an employee knew that he was discharged and replaced by a younger employee, his allegation that the company concealed from him the true reason for his discharge and that it was not until subsequent hirings that the "pattern of age discrimination" became evidence was held insufficient to support equitable estoppel. *Pruet Production Co.*, 784 F.2d at 1279-80; *accord Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir.1989), *cert. denied*, 494 U.S. 1067, 110 S.Ct. 1784,

108 L.Ed.2d 785 (1990); *Blumberg*, 848 F.2d at 645.[2] The showing required for a *prima facie* employment discrimination claim is minimal, *see Pruet Production Co.*, 784 F.2d at 1279, and when "facts that would support a cause of action are or should be apparent," the statute commences even if the employee is not aware of *all* the evidence that he will ultimately rely upon at trial. *Blumberg*, 848 F.2d at 645 (emphasis added). The showing required at the stage of filing charges with the EEOC is even more lenient, because the purpose of the filing is only to initiate an EEOC investigation. *Pruet Production Co.*, 784 F.2d at 1279.

Applying those principles here, we conclude that whatever concealment Mobil may have been guilty of did not deceive appellants as to the facts of the alleged discrimination. Rather, appellants were able to evaluate the propriety of their alleged constructive discharge for ADEA purposes immediately. Just as in individual discharge cases the *prima facie* showing is only that the employee has been discharged and replaced by a younger worker, leaving exploration of an employer's motives for the EEOC investigation or pretrial discovery, here the appellants' *prima facie* case for constructive discharge was that older employees alone were put to the unfavorable choice of early retirement or loss of the lump sum option. This fact, apparent in July 1984, was sufficient to put appellants on notice of possible age discrimination (as it did other Mobil employees) and to require them to assert their rights.

For these reasons, even accepting for purposes of our review of the summary judgment appellants' charges of nondisclosure, we do not believe that a genuine issue of

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[2] This view is consistent with this Circuit's rule in Title VII cases that the limitations period starts running when the plaintiff knows of the discriminatory *act*, not when the plaintiff perceives a discriminatory motive behind the act. *See Merrill v. Southern Methodist University*, 806 F.2d 600, 605 (5th Cir.1986).

material fact exists as to when the statute of limitations on the ADEA claims commenced. Concluding that the district court's grant of summary judgment is supported on that ground, we do not reach the district court's further holding that as a matter of law appellants were not constructively discharged in violation of the ADEA.

II. ERISA Preemption of State Law Claims

We next address the district court's grant of judgment on the pleadings on appellants' state law claims. Appellants charged that Mobil's actions in amending the plan and withholding information about the waiver provision fraudulently induced them to surrender their jobs, were taken pursuant to a plan to reduce Mobil's work force, and breached the duty of good faith and fair dealing owed to appellants by Mobil under their employment contracts. This conduct, appellants alleged, gave rise to claims for fraud, civil conspiracy, breach of the employment contract, unlawful interference with contract rights, negligence, and gross negligence. The district court held these claims were preempted because they "relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA." We turn to the first ground relied upon by the district court, namely that appellants' claims "relate to" an ERISA-governed retirement plan.

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has consistently emphasized the expansiveness of the "relate to" standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern. *See, e.g., Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 482, 112 L.Ed. 2d 474 (1990); *FMC Corp. v. Holliday*, —— U.S. ——, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549,

1552-53, 95 L.Ed.2d 39 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 2899-2901, 77 L.Ed.2d 490 (1983). The words "relate to" are to be given their "broad common-sense meaning," *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), and a state law will be pre-empted "if it has a connection with or reference to such a plan." *Shaw*, 103 S.Ct. at 2900. This Circuit has held that the fact that a claim sought damages measured by pension benefits sufficed as the requisite "connection" to an employee benefit plan for preemption purposes. *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989). *But see Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236, 247 (5th Cir. 1990); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-21 (4th Cir.1989).

The complaints here focus on Mobil's amendment of an ERISA-governed employee benefit plan and Mobil's disclosure to its employees of the terms of the plan. In addition to calculating their damages by computing lost benefits under the plan, a court adjudicating appellants' claims of a fraudulent scheme to reduce the work force would have to examine, at a minimum, the operation of the plan prior to the amendment, the language of the plan amendments, and Mobil's communication to its employees about the terms of the plan amendments. Given the breadth of the section 514(a) test, we find that these connections are adequate to warrant preemption.

This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. DuPont de Nemours and Co.*, 894 F.2d 755 (5th Cir.1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt an early retirement incentive plan, and they sued their

former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a). *Id.* at 758; *see also Cefalu*, 871 F.2d at 1295 (breach-of-contract claim for oral misrepresentation that retirement options offered equivalent benefits was preempted); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir.1989) (claim for breach of an oral agreement to pay early retirement benefits was preempted). In a case almost identical to the present one, the Third Circuit held that where employees alleged that an employer's notification of proposed plan amendments misrepresented to them that they would lose a retirement benefit if they did not retire in a window period before the amendments became applicable, their claims were preempted. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991).

In addition, the Supreme Court recently spoke decisively to the question whether a tort claim premised on wrongful discharge to prevent vesting of pension benefits could survive independently of ERISA. In *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990), the Court found that the claim "related to" an ERISA-covered plan under section 514(a). Appellants here seek to distinguish their "wrongful discharge by fraud" claim from the tort claim at issue in *McClendon*. They argue that whereas the existence of a pension plan is a necessary *element* of the cause of action considered in *McClendon* (discharge to prevent vesting of pension benefits), here the pension plan was merely the *subject* of Mobil's fraud. The fraud claim itself, they argue, is conceptually identical to a fraud claim concerning any other subject matter, and ERISA cannot generally preempt state laws prohibiting employers from fraudulently inducing employees to give up their jobs. Appellants rely on *Mackey v. Lanier Collections Agency and Service*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), in which the Court noted that

lawsuits based on "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted merely because the suits are brought against an ERISA plan. *Id.* 108 S.Ct. at 2187.

We do not find this argument persuasive. We have previously noted that preempted state law includes any state law cause of action as it relates to an employee benefit plan, even if it arises under a general law which in and of itself has no connection to employee benefit plans. *Cefalu*, 871 F.2d at 1292 n. 5. Although there would undoubtedly be cases of fraudulently induced retirement that were not preempted, the specific conduct here, as in *Lee*, *Cefalu*, and *Degan*, relates directly to the operation of an ERISA plan. Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provisions and amendments, *see* ERISA §§ 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b), would undercut the goal of uniform national regulation in the manner that section 514(a) seeks to prevent. *See Memorial Hospital System*, 904 F.2d at 245 (observing that preemption is proper where the state law claims address areas of exclusive federal concern, and where they directly affect the relationship among the traditional ERISA entities). In our view, this makes the conduct at issue here a far cry from the "run-of-the-mill" claims alluded to in *Mackey*.[3]

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[3] Appellants also cite *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D.Pa.1987), which does provide more direct support for their argument than the fact that the *subject* of the alleged fraud is pension benefits is incidental and does not waarant preemption. *See id.* at 742. However, we agree with the Seventh Circuit that *Greenblatt* is not consistent with our Circuit's holding in *Cefalu*. *See Lister v. Stark*, 890 F.2d 941, 945 n. 10 (7th Cir.1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990). Therefore, we, like the Seventh Circuit, decline to follow *Greenblatt*. *See id.* at 945.

For the same reason, appellants' reliance on *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir.1989) (per curiam) is misplaced. In *Hartle*, a discharged employee brought suit for wrongful termination and civil conspiracy to unlawfully terminate his employment. Because the general rule in Mississippi was employment at will, he argued that his participation in an employee benefit plan had removed his employment from employment-at-will status and had effectively given him a tenured position. However, because the employer's complained-of conduct did not pertain to the operation of an ERISA plan, we observed that Hartle's claim did "not in any manner implicate the federal regulation of employee benefit plans" and held that preemption was not proper. *Id.* at 356. Here, the employer's conduct *does* relate to the pension plan, and federal regulation of retirement plans is implicated to a much greater degree.

Finally, appellants argue that even if their state law claims are preempted to the extent that the damages sought are deemed to be "benefits," the preemption would not bar the claims in their entirety, and that the claims for lost wages, exemplary damages, and the like, would survive as state law claims. They rely on several cases finding partial preemption only. One is *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990), in which a terminated employee filed claims under the ADEA and for breach of an implied contract for tenured job security. The district court entered summary judgment for the defendant on the breach-of-contract claim insofar as it sought lost pension, health insurance, or life insurance benefits, on the grounds of ERISA preemption. The Tenth Circuit upheld a verdict for the plaintiff on the claim for lost salary, however, stating, "We are at a loss to see how a breach of contract claim solely for lost salary is at all related to an employee benefit plan," and holding that there was no preemption of that claim. *Id.* at 680 (citing *Hartle*, *supra*). Likewise, in *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987), the Ninth Circuit held that an employee's claim

of breach of contract and wrongful discharge in part relied on theories independent of the benefit plan and thus was not entirely preempted. *Id.* at 800. Finally, appellants cite *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1245 (11th Cir. 1989), for the proposition that the same set of operative facts can give rise to both preempted and unpreempted causes of action.

We conclude that this type of partial preemption is inappropriate in the present case, however. Unlike *Krause*, this case is not one where the main nexus to an employee benefit plan is only the calculation of damages. Once stripped of its link to the pension plan provided by the measure of damages, the *Krause* plaintiff's claim survived as a suit for lost salary based upon breach of an implied contract of continued employment. Here, by contrast, the basis of the claims themselves is the operation of the pension plan: if appellants' claims were stripped of their link to the pension plans, they would cease to exist. The *Sorosky* and *Clark* courts employed a similar analysis which would support complete preemption in the present case. In *Sorosky*, the court held that Sorosky's claim that Burroughs agreed to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits was preempted: it was only breach-of-contract or wrongful discharge theories "that have no relationship to the benefit plan" that survived as independent state law claims. *Sorosky*, 826 F.2d at 800. The *Clark* court confronted an employee's claim that his termination, in addition to being effected for the purpose of interfering with his attainment of pension benefits in violation of ERISA § 510, 29 U.S.C. § 1140, was carried out in a malicious manner that inflicted severe emotional distress upon him. The court held that the tort claim, though it "allude[d] to conduct which was proximate (or even concurrent) in *time* to the alleged ERISA violation," was "wholly remote in *content*": the employee had "not alleged any conduct on the part of Coats & Clark which relates to

the processing of any ERISA covered benefit or claim." *Clark*, 865 F.2d at 1243. However, *Clark* carefully distinguished the employee's claim there from a claim that a refusal to pay pension benefits was itself so outrageous as to amount to intentional infliction of emotional distress, which the court had found to be preempted in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987).

Because the underlying conduct at issue here cannot be divorced from its connection to the employee benefit plan, we uphold the district court's judgment that the state law claims are preempted in their entirety.

III. ERISA Standing

ERISA grants standing to a "participant" to bring a civil action to enforce his rights under the terms of a plan or to enforce the provisions of ERISA. ERISA § 502, 29 U.S.C. § 1132. The district court granted Mobil's motion to dismiss appellants' ERISA claims on the ground that appellants were not "participants" within the meaning of that section and therefore were not empowered to sue. *See Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1286 & n. 3 (5th Cir. 1980).

ERISA defines the term "participant" to include "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The Supreme Court recently addressed the meaning of the "former employee" component of that definition. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Court observed that the definition referred to "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Id.* 109 S.Ct. at 958 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.)

(per curiam), *cert. denied*, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court also construed the "may become eligible" language of section 3(7) to mean that "a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

Mobil argues that appellants do not have standing because they have neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment. In Mitchell's suit against Mobil, the Tenth Circuit denied ERISA standing to the plaintiffs on the ground here urged by Mobil. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The first part of this conclusion finds support in the decisions of this Circuit. We have held that where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for damages, not vested benefits. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir.1985) (per curiam); *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985); *accord Kuntz*, 785 F.2d at 1411. In *Yancy*, the employer announced its intention to modify the interest rate factor used to calculate lump sum retirement benefits, but gave employees approximately three months in which to retire under the older, more generous discount rate. We denied standing to an employee who took early retirement during the three months, received his lump sum payment, then sued alleging that the amendment of the plan violated fiduciary duties imposed by ERISA. We held that, lacking a claim for vested benefits, he could not be deemed a plan "participant." *Yancy*, 768 F.2d at 709.

For the second part of its conclusion—that the plaintiff lacked a reasonable expectation of returning to covered employment—the *Mitchell* court relied on the fact that the plaintiff had not sought reinstatement. *Mitchell*, 896 F.2d at 474; *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991); *Kuntz*, 785 F.2d at 1411. In the present case, the only request for reinstatement in appellants' original complaint is in the ADEA claim, which we have held to be barred by the statute of limitations. *See* section I, *supra*. However, this request does indicate that appellants do desire court-ordered reinstatement.

We are not convinced that *Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising a right provided by ERISA or "for the purpose of interfering with the attainment" of a right provided by ERISA. The Supreme Court's recent *McClendon* decision held that this provision would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990). The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested

relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. *Cf. Amalgamated Clothing and Textile Workers v. Murdock*, 861 F.2d 1406, 1418 (9th Cir.1988) ("It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing . . . to redress the fiduciaries' alleged breach of the duty of loyalty.").[4]

Therefore, recognizing that we are anchored at one end by *Yancy*, we also believe that *Yancy* does not extend so far as to encompass situations such as the one at issue in *McClendon*. The question then becomes where on that axis the present case falls. A few pertinent distinctions between the two cases bear emphasis. Yancy's position as a retired employee who had received lump sum benefits was largely of his own making. He was informed of the plan amendment and of the effects of each option open to him. Our holding in the case amounts to a decision that he could not both accept the offered inducement for early retirement and then later complain of the choice to which he had been put, if he felt that he was entitled to continue to work and then retire at the time of his choice with a lump sum calculated at the old rate, he was obligated to act consistently with his desired relief by remaining a covered employee

[4] We do not mean to imply that an employee's entitlement to certain *remedies* might not turn on whether or not he was willing to return to work. If, for example, he claimed entitlement to the fully vested pension as damages, it might be perfectly reasonable to require that he return to work at least for the additional length of time required for the pension to vest. However, a wrongful discharge might give rise to other damages as well, for which reinstatement would not seem to be a logical prerequisite.

and challenging the plan amendment. The violation he alleged—an amendment of the retirement plan that amounted to a breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109—was not one that in and of itself divested aggrieved parties of their status as covered employees able to sue. McClendon, on the other hand, had no such choice. A discharge to prevent vesting of benefits in violation of section 510 by definition must be challenged by someone other than a current employee or someone with a claim to vested benefits. Thus, the standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. *See Amalgamated Clothing*, 861 F.2d at 1410.

The Third Circuit alluded to this problem in its recent *Berger* decision. There, Edgewater Steel amended its retirement plan to eliminate two benefits: a lump sum payment in place of the first three months of pension benefits, and a supplemental payment given as an early retirement benefit to employees whose retirement was in the mutual interests of the company and the retiree and was approved by the company. Upon announcement of these changes, Berger and the other plaintiffs chose to retire before the amendments became effective. They each received the three-month lump sum provided automatically to all retirees, but none were approved for the supplemental payment. Among the plaintiffs' allegations were a charge that the elimination of the three-month lump sum amounted to the elimination of an accrued benefit in violation of ERISA § 204(g), 29 U.S.C. § 1054(g), and a charge that the amendment constituted an intentional interference with their right to both benefits, in violation of ERISA § 510, 29 U.S.C. § 1140. The court, citing *Kuntz* and *Yancy*, held that the plaintiffs

did not have standing to assert their section 204(g) claim because they had retired and accepted the benefits in a lump sum, and had not asked for reinstatement. *Berger*, 911 F.2d at 921-22. However, the court noted the contingency of this conclusion on the denial of the plaintiffs' section 510 claim. *Id.* at 922. It stated: "Of course, we recognize that if the Employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy." *Id.*[5]

On the record before us, we cannot say where on the spectrum between *Yancy* and *McClendon* this case falls. Because appellants pleaded their ERISA claims only as contingent on preemption of their state law claims, and because the district court did not rule on the merits of the ERISA claims, appellants have not fleshed out their ERISA claims and theories, or even identified with pre-

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[5] A Third Circuit decision in a pre-*Firestone* case provides an even more direct illustration of the contingency of standing on the nature of the ERISA violation alleged. In *Saporito v. Combustion Engineering Inc.*, 843 F.2d 666 (3d Cir.1988), *vacated*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989), the plaintiffs claimed that they had been induced to retire under one retirement plan while the employer concealed the development of a second plan with more favorable terms. The court held that they did not have standing as participants in the first plan to sue for breach of fiduciary duties because they had retired and received all of the benefit to which they were entitled in a lump sum. *Id.* at 671. However, the court did hold that they had standing as participants in the *second* plan to argue that they had been tricked into retiring in violation of section 510, because they alleged that "but for the selective divulgence of information, they would have been members of [the second plan], and, for the purposes of standing to bring an action under ERISA, should be considered as such." *Id.* at 672; *see also id.* at 672 n. 7 (distinguishing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986), in which the plaintiff urged "but for" participant standing, but his claim was rejected because the events precluding standing were under his control). *Saporito* was vacated and remanded by the Supreme Court for further consideration in light of *Firestone*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989).

cision which sections of ERISA they claim were violated. However, their allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's nondisclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case from both *Yancy* and *Mitchell*. Appellants also sought reinstatement in their ADEA action, and did not affirmatively indicate that reinstatement was not sought under their ERISA claims. For these reasons, we cannot now foreclose the possibility that they could prove facts that would create standing for them, and we believe that the trial court's dismissal on the pleadings of the ERISA claims was premature. Of course, appellants can, and doubtless should, be required to plead their ERISA claims with greater specificity.

We emphasize that we have not determined that appellants will be able to establish a violation of section 510, only that they should be allowed to attempt to do so. We reverse the trial court's dismissal of appellants' ERISA claims and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment to Mobil on the ADEA claims and its grant of judgment on the pleadings for Mobil on all of appellants' state law claims. However, we reverse and remand the district court's dismissal of appellants' ERISA claims.

AFFIRMED In Part; REVERSED And REMANDED In Part.

Order of the United States District Court for the Eastern District of Texas granting Motion for Judgment on the Pleadings and Motion to Dismiss, June 22, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civ. No. B-89-0653-CA

June 22, 1990

GERALD W. CHRISTOPHER, *et al.*,
Plaintiffs,

—v.—

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER

1. CAME ON to be considered the Motion for Judgment on the Pleadings and Motion to Dismiss filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' state-law claims are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") because those claims relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA;

B. Plaintiffs are not participants seeking to recover benefits under Mobil's Retirement Plan and therefore have no cause of action under ERISA § 502; and

C. The Court lacks jurisdiction over plaintiffs' ERISA claim because plaintiffs do not have a cause of action under ERISA.

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Judgment on the Pleadings and Motion to Dismiss be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd DAY OF JUNE, 1989 [sic].

/s/ Richard A. Schell
United States District Judge

Order of the United States District Court for the Eastern District of Texas granting Motion for Summary Judgment, June 22, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civ. No. B-89-0653-CA

June 22, 1990

GERALD W. CHRISTOPHER, *et al.*,
Plaintiffs,

—v.—

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER

1. CAME ON to be considered the Motion for Summary Judgment filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, statement of undisputed facts, declaration and affidavit, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' Age Discrimination in Employment Act ("ADEA") claims are time-barred because (*i*) plaintiffs did not file an age-discrimination charge with the Equal Employment Opportunity Commission within 300 days after the alleged discrimination occurred (29 U.S.C. § 626(d)(2)), and (*ii*) plain-

tiffs did not file a lawsuit under ADEA within three years after the alleged discrimination occurred (29 U.S.C. §§ 255(a), 626(e));

B. Plaintiffs' state-law claims are time-barred by applicable statutes of limitations;

C. Plaintiffs were not constructively discharged in violation of ADEA; and

D. Plaintiffs' claims of discrimination arise from changes in the fringe benefits available under Mobil's bona fide Retirement Plan, not from any conduct related to the nonfringe-benefit aspects of plaintiffs' employment, and are therefore not within the scope of ADEA pursuant to 29 U.S.C. § 623(f)(2).

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd DAY OF JUNE, 1989 [sic].

/s/ Richard A. Schell
United States District Judge

Order of the United States Court of Appeals for the Fifth Circuit denying appellants' petition for rehearing, February 24, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4562

Filed: Feb. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY and BILLY G. TURNER,
Plaintiffs-Appellants,

versus

MOBIL OIL CORPORATION, RETIREMENT PLAN OF MOBIL OIL CORPORATION AND REX ADAMS,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

Before:

HENLEY*, KING, and GARWOOD,
Circuit Judges.

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* Circuit Judge of the Eighth Circuit, sitting by designation.

PER CURIAM:

IT IS ORDERED that appellants' petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

Denial of Motion for Summary Judgment of the United States District Court for the District of Colorado, dated June 25, 1992

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-2112

FREDERIC J. RAYMOND, *et al.*,
Plaintiffs,

vs.

MOBIL OIL CORPORATION, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT

(Hearing on Motion for Summary Judgment)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:50 a.m., on the 25th day of June, 1992, Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

PRYOR, CARNEY, and JOHNSON, P.C., by RODNEY R. PATULA and ELIZABETH MORAN, Attorneys at Law, 6200 South Syracuse Way, Suite 400, Englewood, Colorado, 80155, appearing for the plaintiffs.

HADDON, MORGAN & FOREMAN, P.C., by HAROLD A. HADDON and MAUREEN A. CAIN, Attorneys at Law, 150 East Tenth Avenue, Denver, Colorado, 80203; LOREN

KIEVE, Attorney at Law, Debevoise & Plimpton, 555 13th Street, N.W., Washington, D.C., [2] 20004, and MICHAEL E. TIGAR, Attorney at Law, 727 East 26th Street, Austin, Texas, 78705, appearing for the defendant.

* * * *

THE COURT: Thank you.

I think perhaps we should start, if you want to just have a seat for a moment—

MR. TIGAR: Yes, your Honor.

THE COURT: —by my telling you how this looks to me on the briefing and on the paper. This is a motion for summary judgment on the ERISA claims, and it appears to me from looking at the briefs, from looking at the claims, from reviewing the *Christopher v. Mobil Oil* case in the Fifth Circuit and the [3] *Mitchell v. Mobil Oil* case in this circuit and all of the other cases that have been decided, including *Firestone*, that what Plaintiff has done in pleading this ERISA or these ERISA claims is to fit them as closely as possible under the rulings of *Christopher* and trying to avoid in the pleading the adverse effects of rulings of *Mitchell*. And it appears to me also that reading *Christopher* carefully, there are factual issues which were left open under *Christopher*, which were not discussed in *Mitchell*, which probably this court is going to have to try.

Now, that's how it looks on paper; and I'm certainly going to listen to the arguments of the defendants as to why this is not the case. But I think we have some primary cases here to consider. Well, the two core cases that were argued in the briefs were the *Christopher* case and the *Mitchell* case. But if this case is fit very carefully under the ruling in *Christopher* and does not appear to be covered by the ruling in *Mitchell*, then the motion will have to be denied.

* * * *

[38]

RULING

THE COURT: Well, let me address *Boren*. Mr. Boren was not an employee within the meaning of ERISA; and when he asked to be treated as if he were a former employee, he is asking for a determination that he was at one time an employee, as opposed to the position of the plaintiffs. As I understand Plaintiffs' theory is saying that but for the actions of Defendant, they still would be employees of Defendant; and this case is predicated on the fact that they were employees at one time, unlike Boren.

I realize that Judge McKay, who this court has the most high respect for—and I do for Judge Moore, too, and all the Tenth Circuit judges—made some statements in *Boren* which appear to be fairly broad statements. But indeed, in looking at the facts of *Boren*, they were talking about a factual situation which does not appear to me, at least, to apply in this case.

There are many rules and many cases about granting motions for summary judgment, and I think judges sometimes overlay on this law their own experiences with summary judgment. Having been a judge for a long time, I have an overlay; and that is, it's sort of like the old "I know it when I see it," which used to be the rule in pornography cases. When I am [39] comfortable that there are no factual issues and when I can grant something as a matter of law, when I have that feeling that there are no factual issues, when I have to decide the case on summary judgment and all the facts and the arguments convince me of that, then I grant the motion for summary judgment—you know—considering all of the other cases that are there on summary judgment.

But when I have this lingering feeling that there may be factual issues, even though I think probably there is going to be a difficult time, there is going to be a difficult effort of plaintiff to prove these factual issues—I don't

think it's going to be easy; I think it's going to be most difficult—when I have this nagging feeling that well, I'm not sure as a matter of law that we've really taken care of all factual issues, then I simply have to resolve it by denying the motion for summary judgment.

Now, what we have here are two very important cases, one in the Tenth Circuit and one in the Fifth Circuit. And the question is, can they be distinguished? Does the Fifth Circuit carve out an area which was not considered by the Tenth Circuit and which has to be considered by this court, even in view of the strong ruling of the Tenth Circuit?

And I will admit, as much respect as I do have for the judges that decided *Mitchell v. Mobil*, I really do wonder if they read my opinion carefully on the ERISA claims in finding [40] that he didn't seek reinstatement—that Mr. *Mitchell* didn't.

Be that as it may, that's the rule. I'm bound by that decision. I have no intent to be overruled in the Tenth Circuit, if I can uphold it; and what we have, then, is the Fifth Circuit carving out a little area from Mobil and saying, if I can just paraphrase what they say on 1223 of their opinion—and maybe I better put this on the record. For the record, *Christopher v. Mobil* is 950 F.2d 1209, Fifth Circuit, 1992. What they say is here's an area that might—might; it isn't for sure—might distinguish this case from *Mitchell*, and that is if a plaintiff is alleging deceptive conduct which vitiates the voluntariness of the decision to retire, the "but for" test, that might distinguish this case from *Mitchell*.

Plaintiffs have fit in this case right to that exception; and they say, We are alleging and we intend to prove—now, I don't know if they're going to be able to prove it; it's going to be tough—but we are alleging and we intend to prove deceptive conduct which will show that none of these plaintiffs would have retired, had they not been deceived, had they not been defrauded. We're talking about fraud here.

Maybe it was hinted at in *Mitchell*, and I don't know what you folks argued; but it really didn't come out that way, it seems to me, in the trial that strongly.

So here's an area: Mitchell (sic), they're arguing, we're alleging, committed fraud on us, deceived us. We would [41] not have retired had we known the truth, had we not been deceived, had we not been defrauded.

The Fifth Circuit, good judges, say this distinguishes or this might distinguish this case from *Mitchell*. All these circuit judges are supposed to be really experts in the law, may be experts in the law more than the trial judges. At least they have the last word. So here are the judges, the three judges on the Fifth Circuit saying, Here's an area that's different, might be distinguished.

I'm not going to say it can't be distinguished. I've got that feeling that boy, I'm not sure. I'm not sure that they can't prove it. And if they can they can prove it, they have to have the chance to prove it.

I think one must read the law also with good common sense and good judgment; and if, indeed, hypothetically an employee has been deceived by an employer—I'm not talking about Mobil now, but just what is the policy, what should be the law. If an employee has been deceived, defrauded by the employer, and retires because of that deceit when they never would have retired, does that mean they can't sue under 510, just because they've taken benefits? And common sense tells us there have to be—there has to be an exception to the flat rule stated in *Mitchell*, and this deceptive conduct certainly from a matter of policy, from a matter of good common sense, seems to be that area.

[42] So even though there might be a bright line rule in *Mitchell*, there appears to this court that there might very well be, as stated by the *Christopher* court, a way of distinguishing that; and that is if there is deceptive conduct.

Now, if the plaintiffs can prove it—I don't know if they can prove it sufficiently—but if they can prove it,

then I think we do have a distinguishing feature and I think they have brought their case in an area that fits under—fits under the *Christopher* case and may very well be an area which would cause the Tenth Circuit to say, You know, we didn't really mean that. We really didn't mean that if there is something promised the following year and then they're defrauded and they're retiring because they're defrauded that the ERISA—that they're foreclosed from suing under ERISA.

So looking at the statute with good judgment and what the policy should be, which is to protect the employees, looking at the fact that these were employees, their allegation is that they would not have retired. They have brought this case under the very narrow confines of *Christopher*.

I don't feel I can grant the motion for summary judgment; and accordingly, the motion for summary judgment on the ERISA claims will be denied and we'll have to hear what the facts are.

Now, one more thing: We now no longer have motions for directed verdict in Federal Court. We have motions for [43] judgment on the law. The rules have been changed. So if, indeed, this proof does not come forward, I'll be hearing your argument, maybe not even at the end of the plaintiffs' case maybe in the middle of the plaintiffs' case, when they have a chance to go through ERISA, whichever one they're going to prove first. But this is something that I'm sure that will come up for argument in the trial case—in the trial.

* * * *

STATUTORY PROVISIONS

ERISA § 3(7), 29 U.S.C. § 1002(7)

For purposes of this subchapter:

* * * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 502, 29 U.S.C. § 1132

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant of beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary *(A)* to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or *(B)* to obtain other appropriate equitable relief*(i)* to redress such violations or *(ii)* to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary *(A)* to enjoin any act or practice which violates any provision of this subchapter, or *(B)* to obtain other approrpiate equitable relief *(i)* to redress such violation or *(ii)* to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or *(i)* or *(l)* of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (*A*) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (*B*) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary

(except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted

by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 510, 29 U.S.C. § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.